United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1356

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

WILLIAM RAMSDEN,

Appellant.

DOCKET #75-1356

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

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UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

TABLE OF CASES

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court, Eastern District of New York, dated October 3, 1975, convicting appellant after a jury trial of the crimes of possession of cocaine with intent to distribute, in violation of 21 UCS 841 (a) (1) and 18 USC 2, and of attempted distribution of cocaine, in violation of 18 USC 2, 21 USC 846, 21 USC 841 (a) (1), and sentencing him to imprisonment for three years, to serve six months.*

* The balance of thirty months was suspended and appeallant was placed on probation for three years with a special parole term of five years.

STATEMENT OF FACTS

Appellant was indicted * and charged with two counts of possession and attempted distribution of four ounces of cocaine. On July 28, 1975, he was brought to trial before the Honorable Edward R. Neaher, U.S. D.J., and a jury.

The Government's principal witness was Martin Seigel, Special Agent for the Drug Enforcement Administration. He testified that on October 12, 1973, while operating as an undercover agent, he agreed to purchase a quantity of cocaine from James Glass. (97) ** On the day of the proposed transaction, October 15, 1973, Agent Siegel had three telephone conversations with Glass wherein arrangements were made for a meeting that evening for the purpose of consummating the sale. These conversations were taped. (101) Appellant was not mentioned in any of these conversations; however, over defense counsel's objections the tapes were admitted into evidence subject to connection, (96) and played for the jury. (106)

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* Appellant was indicted along with Audrey Joseph and James Glass; appellant's case, however, was severed from those of the other two defendants.

** Pagination is to minutes of trial, July 28, August 1, 1973, (Neaher, J).

Agent Siegel testified that, after obtaining some $3,500 in Government funds, and being fitted with a transmitter, (117) he met Glass, and, with Glass, proceeded to the intersection of Kane and Court Streets in Brooklyn. (121) There they were met by Audrey Joseph, who accompanied them to 251 Kane Street. Over defense counsel's objection, Agent Siegel was permitted to testify that Miss Joseph told them that they would wait in an apartment while she obtained the cocaine from "her man" downstairs. (122)*

Agent Siegel stated that he, Glass and Audrey Joseph, entered apartment 7A at 152 Kane Street, which was two flights up. (123) This being a duplex apartment, there was a staircase within it, leading to the floor below. Miss Joseph descended the interior staircase and was met by appellant. The witness said that he saw appellant hand something to Miss Joseph, but he could not see what it was. (124)

When Miss Joseph came back upstairs, she had with her four plastic bags containing white powder. (125) This they weighed, and Agent Siegel made a test for the presence of cocaine. (131) **

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* Again, appellant's name was not mentioned.

** A stipulation was entered into by counsel for both sides, to the effect that the chemist would testify that the packets contained cocaine. (91) This stipulation was later expanded to embrace the fact that the packets Agent Siegel picked up on the hallway floor, after the arrest of defendant, Glass and Joseph, were the same as those tested by the chemist. (282-3)

He also marked each of the plastic bags with his initials (159) telling Glass that he wished to make sure he received the right ones. (270) The three then agreed that Glass would stay in the apartment with the packets while the agent and Miss Joseph went down to the car to get the money. (134) The agent stated that Miss Joseph called to appellant, who came upstairs and agreed to watch while the money was transferred. Glass put the packets into his pocket, and appellant and the others descended the staircase in the common hallway of the building.* Appellant opened the door of the lower section of the duplex, and kept it ajar while he went inside and looked out. (135) Arriving in the street Agent Siegel walked Miss Joseph around the corner and arrested her. (136) Then he went back into the building and arrested appellant, then apprehended Glass, and finally, on the landing of the common stairway, he picked up four packets containing white powder. (137)

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* In the Grand Jury, just two months after these alleged indicents Agent Siegel's testimony was substantially different on this point. At that time, instead of saying that appellant had come upstairs, he had testified that he and Miss Joseph went down, using the common stairway, and that, when they reached the lower door of the duplex, and Miss Joseph asked appellant to wait in the hall. (246) When confronted with this discrepancy Agent Siegel said he had been mistaken in his Grand Jury testimony. (245)

By this time, ten or fifteen minutes had elapsed since Glass had pocketed four plastic bags. (192) The agent testified that each of the packets he picked up had some kind of marking on it in ink. (266) However, the bags offered in evidence had no markings at all on three of them, and only three little lines on one. (180-181) * The agent himself admitted that, apart from those little lines, there was no way at all to distinguish these four packets from any others. (185) For these reasons, defense counsel moved to exclude these packets but his motion was denied. (284) **

Appellant, William Ramesden, 36, of 392 Union Street, Brooklyn, took the stand in his own defense (334). He stated that he had known Audrey Joseph for some four years, (354). About three weeks prior to the evening of October 15, 1973, he had met Miss Joseph on the street, and she told him that she was living at 251 Kane Street. (337).

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* Agent Siegel stated that when he appeared in the Grand Jury, just two months after appellant's arrest, the packets had no markings. He believed, he said, that the markings had worn off. (194).

** It might be noted that Agent Siegel testified that when she came upstairs with the four packets, she also had with her a folded piece of tinfoil which, she said, contained dextrose. (125) Later, she added some cocaine from one of the white packets to her tinfoil package. (154) Chemical analyses, however, failed to disclose the presence of cocaine in the tinfoil. (277).

On October 15, 1973, he ran into a friend of his, Flozell Telfair,* at a tavern both were in the habit of frequenting. As the tavern was only four blocks from the Kane Street address, they decided to pay Miss Joseph a visit. (338) When the three had talked for a while, Miss Joseph told them that there was a vacant apartment in the building. (340) Knowing that his friend, Nancy Gallenson, ** was looking for an apartment, appellant thought he would have a look at it, since, as a carpenter, he often gained the benefits of additional employment when his friends moved. Therefore appellant, with Miss Joseph and Telfair, went up to the third floor and entered an apartment numbered 7A. (341-2) It was open though vacant, and the electricity was on. (368)

After a few minutes, Miss Joseph left and appellant and Telfair, having looked around the upper floor of what he now realized was a duplex apartment, descended the interior staircase to the lower floor. (341-42) There they found a large collection of pornographic picture and magazines, which the two began to

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* Telfair, testifying for the defense, corroborated appellant's testimony in every respect. (292-318)

** Miss Gallenson, a Supervisor with the Court Employment Project testified that in late September or early October of 1973, she had told many people that she intended to move. Although she could not specifically recall telling either appellant of Telfair, she did say she had mentioned it at the same tavern frequented by them. Moreover, she recalled discussing the Kane Street apartment with appellant in the second week of October 1973. (285-291)

peruse. (344). Five minutes passed, after which they heard voices.

Appellant stated that the only voice he recognized was that of Miss Joseph. (348) He called up to ask Miss Joseph how much the rent on the apartment was, and she answered that it was $300. (350) He never got a chance to ask who Miss Gallerson should contact about renting the apartment, (367) because he was arrested.

Appellant testified that he never mounted the interior staircase to the upper floor, nor did he ever hand Miss Joseph anything. (349) He also stated that he never descended the common staircase from the third to the second floors. (352) Moreover, he was sure he did not see any drugs on the evening of October 15, 1973, (Id.) and that he himself had never sold any drugs, nor known that Miss Joseph dealt in them. (353, 358)

Appelant's testimony concluded the case for the defense. Defense counsel renewed his motion to exclude the evidence of the telephone conversations between the agent and Glass. (385) The court reserved decision; (Id.) while no decision was ever rendered on the motion, the court instructed the jury that it could consider that evidence. (500)

Appellant was found guilty under both counts of the indictment, and, on October 3, 1975, was sentenced to be incarcerated for a period of three years, to serve six months, the balance of the thirty months suspended. Appellant was also placed on probation for three years with a special parole term of five years.

ARGUMENT

Point One

The trial court erred in denying defense counsel's motion to exclude the taped telephone conversations, as the Government failed to adduce sufficient proof that appellant participated in the crime as an aider and abettor.

At the outset of appellant's trial, the Government adduced evidence of taped telephone conversations between Glass, a co-defendant not then on trial, and an undercover agent of the Drug Enforcement Administration. This evidence, it is true, was admitted subject to connection, but it is our contention that insufficient evidence was adduced to support that connection, and that, therefore, the evidence should have been excluded.

It is axiomatic that the declarations of one co-conspirator may be used against another, on the theory that the declarant is the agent of his confederate. Lutwak v. United States, 344 U.S. 604 (1953). In this circuit, it is well-established that the foregoing rule applies even where the indictment contains no conspiracy count. See, e.g., United States, v. Talbot, 470 F. 2d 158 (2d. Cir . 1972); United States v. Accardi, 342 F. 2d. 697 (2d. Cir. 1965). See also, United States v. Lucido, 486 F. 2d. 868 (6th. Cir. 1973).

However, as the Supreme Court of the United States held in Glasser v. United States, 315 U.S. 60, 74 (1941) :

> .....(S)uch declarations are admissable over the objection of an alleged co-conspirator who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy. .... Otherwise hearsay would lift itself by its own boot straps to the level of competent evidence.

Thus, it is clear that there must be independent proof establishing the conspiracy or the joint venture, in order for the declarations of one conspirator or co-defendant to be admissable against another, United States v. Lucido, supra.

In the instant case, the evidence at issue consists of taped conversations between Glass, a co-defendant, and Agent Siegel, arrranging for a meeting, that evening, for the purpose of engaging in a narcotics transaction. Glass and Siegel arranged to meet on a particular street corner, whence they planned to proceed to the "source" of the drugs, referred to in the conversations only as "she". Appellant was never mentioned in the conversations; in fact no male was mentioned at all save one "John" who was referred to as a buyer. Nonetheless, this evidence was adduced and the tape played for the jury, quite early in the Government's direct case. It was admitted, presumably under the co-conspirator exception, subject to connection.

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the lower door of the duplex, Miss Joseph asked appellant to wait in the hall and watch her go out to get the money. When confronted with this discrepancy in his testimony, Agent Siegel stated that his earlier version of the events was a mistaken one.

This discrepancy, of course, casts a shadow upon Agent Siegel's credebility. However, whichever version we select, the proof of appellant's participation remains inadequate. Appellant freely admitted that he was in the apartment; in fact, his explanation, to the effect that he was there to inspect it for a friend who might wish to rent it. (The friend, Nancy Gallenson, testified that she had been looking for an apartment at that time, and that she had told this to many patrons of the tavern which she, and appellant, were wont to frequent). Since appellant was in the apartment, and was known to Audrey Joseph, it is not surprising that a young woman, about to go out into the street at night, with a man she's never met before, would ask a friend to watch her progress, and make sure she returned safely. Even if Agent Siegel is to be believed, therefore, his testimony on this latter point, as well, is insufficient to prove appellant's participation in the transaction.

Finally, mere pressence at the scene of a crime, even where there is knowledge that a crime is being committed, does not render one criminally liable as a aider and abettor. United States v. Terell, 474 F. 2d. 872 (2d. Cir. 1973) Here, there was

little evidence of appellant's actual participation in the crime, beyond his admitted presence in the apartment. This was insufficient to prove him guilty as an aider and abettor. That being so, under Glasser v. United States, supra, the evidence of Glass' telephone conversations should have been excluded.

CONCLUSION

For the above stated reasons, appellant's conviction ought be reversed and a new trial ordered.

RECEIVED
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